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Supreme Court, U.S.  
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Case No. 92-9093

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IN THE SUPREME COURT OF THE UNITED STATES

OCTOBER TERM 1992

JOHN JOSEPH ROMANO,

Petitioner,

v.

THE STATE OF OKLAHOMA,

Respondent.

RESPONSE TO PETITION FOR WRIT OF CERTIORARI

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17pp

INDEX

Page

SUBJECT INDEX

QUESTION PRESENTED . . . . . 1

STATEMENT OF THE CASE . . . . . 3

SUMMARY OF THE ARGUMENT . . . . . 5

REASONS FOR REFUSING TO GRANT THE WRIT . . . . . 6

I. THE COURT OF CRIMINAL APPEALS  
PROPERLY FOUND THAT THE MENTION  
OF A PRIOR DEATH SENTENCE DURING  
THE SENTENCING STAGE COULD NOT  
HAVE AFFECTED THE JURY'S  
SENTENCING DETERMINATION . . . . . 6

II. THE COURT OF CRIMINAL APPEALS  
ADDRESSED ALL "THREE" ISSUES WHICH  
PETITIONER NOW COMPLAINS WERE NOT  
FULLY ADDRESSED ON DIRECT APPEAL . . . . . 9

CONCLUSION . . . . . 12

CASES CITED

Ashe v. Swenson, 397 U.S. 436,  
90 S.Ct. 1189, 25 L.Ed.2d 469  
(1970) . . . . . 10

Bell v. South Carolina, 498 U.S. 881,  
111 S.Ct. 227, 112 L.Ed.2d 182  
(1990) . . . . . 8

Caldwell v. Mississippi, 472 U.S. 320,  
105 S.Ct. 2633, 86 L.Ed.2d 231  
(1985) . . . . . 6

California v. Ramos, 463 U.S. 992,  
103 S.Ct. 3446, 77 L.Ed.2d 1171  
(1983) . . . . . 7

Johnson v. District Court of Oklahoma County, 653 P.2d 215  
(Okla. Crim. App. 1982) . . . . . 10

Johnson v. State, 665 P.2d 827

(Okla. Crim. App. 1983) . . . . . 11

Jurek v. Texas, 428 U.S. 262,  
96 S.Ct. 2960  
(1976) . . . . . 11

Romano v. State, 847 P.2d 368  
(Okla. Crim. App. 1992) . . . . . 2, 3, 7, 11, 12

State v. Bell, 302 S.C. 18,  
393 S.E.2d 364  
(S.C. 1990) . . . . . 8

Woodruff v. State, 846 P.2d 1124  
(Okla. Crim. App. 1993) . . . . . 10

STATUTES CITED

21 Okla.Stat. 1991, § 701.12 . . . . . 3

28 U.S.C. § 1257 (a) . . . . . 2

#### QUESTIONS PRESENTED

1. Whether this Court should grant certiorari to reconsider whether a sentencing stage error was harmless, when the Court of Criminal Appeals entered a finding that the error did not affect the jury's verdict.<sup>1</sup>

2. Whether this Court should substitute its judgment for that of the Court of Criminal Appeals regarding the extent an issue must be addressed on direct appeal.

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<sup>1</sup>The State has combined the first two questions presented in the Petition for Writ of Certiorari in its first question presented. Thus, Petitioner's third question corresponds to the State's second question.

#### RESPONSE TO PETITION FOR WRIT OF CERTIORARI

Respondent, the State of Oklahoma, by and through Susan Brimer Loving, Attorney General of the State of Oklahoma, respectfully requests that this Court deny issuance of a Writ of Certiorari to review the decision of the Oklahoma Court of Criminal Appeals.

#### OPINION BELOW

The published opinion of the Oklahoma Court of Criminal Appeals is recorded at Romano v. State, 847 P.2d 368 (Okla. Crim. App. 1992).

#### JURISDICTION

Jurisdiction of this Court is invoked pursuant to 28 U.S.C. § 1257 (a).

### STATEMENT OF THE CASE

Defendant is incarcerated pursuant to a Judgment and Sentence rendered in the District Court of Oklahoma County, State of Oklahoma, Case No. CRF-87-397.

Defendant was convicted by a jury of his peers of the crime of Murder in the First Degree for his participation in the killing of Roger Sarfaty<sup>2</sup>. During the sentencing phase of defendant's trial, the jury found that there was a probability that the defendant constituted a continuing threat to society, that he had previously been convicted of a felony involving violence, that the murder was committed to avoid arrest or lawful prosecution, and that the murder was especially heinous, atrocious, or cruel. Having found the existence of four (4) of the aggravating circumstances necessary under 21 Okla.Stat. 1991, § 701.12 before a penalty of death can be imposed, the jury then assessed the death penalty. The trial court followed the recommendation of the jury. The defendant filed a direct appeal from his conviction, which was affirmed by the Oklahoma Court of Criminal Appeals at Romano v. State, 847 P.2d 368 (Okla. Crim. App. 1992).<sup>3</sup> It is from that

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<sup>2</sup>Petitioner had previously been convicted, in the same county, for another murder charge. That previous conviction, involving the death of LLOYD Thompson, is mentioned and involved in some of the issues presented here. Thus, references to the Sarfaty murder refer to the present case, and references to the Thompson murder refer to the prior conviction.

<sup>3</sup>On direct appeal, the "prior violent felony conviction" aggravator was stricken because that prior felony had been reversed on appeal, subsequent to the defendant's trial in this case. See Romano v. State, 827 P.2d 1335 (Okla. Crim. App. 1992) (the Thompson murder conviction, which was reversed because of improper joinder of the defendant and co-defendant's trials). After reweighing the

direct appeal decision that the petitioner now seeks certiorari review from this Court.

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remaining aggravators against the mitigating evidence, the Court of Criminal Appeals upheld the sentence of death.



#### SUMMARY OF THE ARGUMENT

The Court of Criminal Appeals properly handled the sentencing stage error that occurred when the defendant's prior death sentence was revealed on a Judgment and Sentence introduced in aggravation.

The Court of Criminal Appeals ruled on all issues presented on direct appeal, no presented arguments were omitted.

#### REASONS FOR REFUSING TO GRANT THE WRIT

##### I.

**THE COURT OF CRIMINAL APPEALS PROPERLY FOUND THAT THE MENTION OF A PRIOR DEATH SENTENCE DURING THE SENTENCING STAGE COULD NOT HAVE AFFECTED THE JURY'S SENTENCING DETERMINATION.**

For his first two questions presented in his Petition for Writ of Certiorari the petitioner attacks the Court of Criminal Appeals' decisions, both in method and in the ultimate conclusion reached, regarding petitioner's claim that the jury in his case had their ultimate sense of responsibility for sentencing improperly diminished. As previously mentioned in a footnote above, the State has chosen to respond to these related allegations in one proposition, rather than two separate propositions.

In his direct appeal claim, the petitioner asserted that the jury's responsibility for sentencing was improperly diminished by three separate and distinct acts during the trial proceedings. In this Petition for Writ of Certiorari, petitioner has chosen to focus on only one of those three arguments presented. In the second or sentencing stage of petitioner's trial, a copy of a Judgment and Sentence reflecting petitioner's First Degree Murder conviction and consequent sentence of death for the Thompson murder was introduced in aggravation. Petitioner claims that this was error, and the admission of that fact improperly diminished his jury's responsibility for assessing the sentence in this case.

In deciding the issue on direct appeal, the Court of Criminal Appeals acknowledged this Court's holding in Caldwell v. Mississippi, 472 U.S. 320, 105 S.Ct. 2633, 86 L.Ed.2d 231 (1985)

and specifically found that petitioner's jury was not misled to believe that the responsibility for a determination of the appropriate sentence rested elsewhere. Romano, 847 P.2d at 390.

Acknowledging that it was possible that learning of a prior death sentence could diminish the jury's sense of its role, the Court of Criminal Appeals focused on the instructions given to the jury in this case.

The jury was instructed that it had the responsibility for determining whether the death penalty should be imposed. They were informed of their role as factfinders, that the weight and value of testimony and evidence was for them to determine, that they should not surrender their own judgment to that of any witness or item of evidence, and of their duty to follow the law in reaching their conclusion. It was never conveyed or intimated in any way, by the court or the attorneys, that the jury could shift its responsibility in sentencing or that its role in any way had been minimized. The instructions given to the jury provided sufficient guidance as to how their judgment should be exercised. In this light, it is highly unlikely that the jury's sense of responsibility would have been diminished based upon knowledge of the prior imposition of the death sentence.

Romano, 847 P.2d at 391. The Court did not abandon the issue there, however, but continued its analysis using that "greater degree of scrutiny of the capital sentencing determination" specified by this Court in California v. Ramos, 463 U.S. 992, 998, 103 S.Ct. 3446, 3452, 77 L.Ed.2d 1171 (1983). Under that "heightened standard" the Court again considered the fact of the mention of the Thompson death sentence in the sentencing stage here, and found:

While evidence of the imposition of the death penalty by another jury is not relevant in determining the appropriateness of the death sentence for the instant offense, the admission of this evidence did not so infect the sentencing determination with unfairness as to make the determination to impose the death penalty a denial of due process.

Romano, 847 P.2d at 391 (emphasis added). It is difficult to understand how the Court's analysis, above, does not meet with the constitutional standards set forth by this Court.

A similar issue was presented in State v. Bell, 302 S.C. 18, 393 S.E.2d 364 (S.C. 1990) cert. denied Bell v. South Carolina, 498 U.S. 881, 111 S.Ct. 227, 112 L.Ed.2d 182 (1990). However, in that case, unlike here, certain members of the defendant's jury panel had knowledge prior to the trial that the defendant had a prior conviction and death sentence. However, each of those jurors stated that they could set aside any previous impression or opinion and render a verdict based on the evidence presented in the courtroom. The South Carolina court stated:

[W]e also reject Bell's argument that the jurors' knowledge of the previous death sentence diminished their sense of responsibility in deciding what sentence to impose. . . We find that the reasoning of Caldwell does not control the case at bar. The jurors here disavowed themselves prior to their qualification of any bias or prejudice against the appellant, specifically with respect to his previous sentence of death.

Bell, 393 S.E.2d at 368.

The State respectfully submits that the Oklahoma appellate court's analysis of this issue, and its ultimate decision, was well

within constitutional parameters, and was consistent with the evidence and record on appeal.

This question does not present any issue for certiorari review.

## II.

### THE COURT OF CRIMINAL APPEALS ADDRESSED ALL "THREE" ISSUES WHICH PETITIONER NOW COMPLAINS WERE NOT FULLY ADDRESSED ON DIRECT APPEAL.

In the third question presented to this Court, the petitioner claims that the Oklahoma Court of Criminal Appeals failed to address "three" issues which were raised on direct appeal. "Two" of those "three" issues were raised by Mr. Romano himself in a supplemental pro se brief. The "third" issue was raised by counsel in a supplemental brief.

The first "two" issues, as identified by Petitioner, are "that the Stat was barred and/or estopped from prosecuting the Petitioner in the present case because the State had used the evidence of the Sarfaty homicide to obtain the death penalty in the Thompson homicide trial," and that "the court did not address the double jeopardy arguments concerning whether the Petitioner could be tried at all for the homicide of Sarfaty once the State used that evidence to secure a death sentence in another trial." Petition for Writ of Certiorari to the Oklahoma Court of Criminal Appeals, p. 5.

The State must respectfully disagree. In its direct appeal opinion the Court of Criminal Appeals stated:

Appellant contends that the aggravating circumstance "continuing threat" must be set aside and the death sentence vacated as the principles of double jeopardy and collateral estoppel bar the jury's finding of this aggravator. At the time of the present trial, Appellant and co-defendant Woodruff had been previously tried by jury and convicted of the murder of Lloyd Thompson. During the Thompson trial, the State presented evidence of the Sarfaty homicide in the second stage to support the aggravating circumstance that the defendants constituted a continuing threat to society. The jury in that trial rejected that aggravator. Appellant now argues that the State is precluded from using that same evidence in the instant case to determine whether Appellant constitutes a continuing threat to society.

Romano, 847 P.2d at 387 (bold emphasis). See also Woodruff v. State, 846 P.2d 1124, 1141 - 1143 (Okla. Crim. App. 1993) (petitioner's co-defendant) in which the Court stated the issue, thus:

Appellant contends . . . that by presenting evidence of Sarfaty's murder during the Thompson trial, the State was collaterally estopped from bringing the instant prosecution.

Woodruff, 846 P.2d at 1141. In both this case and the co-defendant Woodruff's case, the Court of Criminal Appeals then went on to analyze the double jeopardy and collateral estoppel claims under the holdings of this Court in Ashe v. Swenson, 397 U.S. 436, 90 S.Ct. 1189, 25 L.Ed.2d 469 (1970) and that Court itself in Johnson v. District Court of Oklahoma County, 653 P.2d 215, 219 (Okla. Crim. App. 1982) wherein the Court of Criminal Appeals held that "the evidence of aggravating circumstances at the sentencing stage in a capital case does not establish an independent crime."



Ultimately, in the case at bar, the Court of Criminal Appeals concluded:

The jury's consideration of the evidence of Sarfaty's murder during the second stage of the Thompson trial was not a final decision on the ultimate issue of Appellant's guilt or innocence of Sarfaty's murder.

Romano, 847 P.2d at 388. The State respectfully submits that the Court of Criminal Appeals properly considered the petitioner's double jeopardy and collateral estoppel claims.

The petitioner finally asserts that the Court of Criminal Appeals failed to address the claim regarding the sufficiency of the evidence to support the aggravating circumstance of continuing threat to society, when considering the effect of the reversal of the Thompson murder conviction. Of course, it is well settled that a crime need not even be adjudicated to be considered as evidence in support of this aggravating circumstance. Jurek v. Texas, 428 U.S. 262, 96 S.Ct. 2960 (1976); Johnson v. State, 665 P.2d 827 (Okla. Crim. App. 1983). Thus, the State respectfully submits that there was no need for the Court to consider the effect of the vacation of the Thompson conviction on the continuing threat aggravator. The Thompson conviction was not vacated because of insufficiency of the evidence, but because of improper joinder. It was still good evidence to consider in support of this aggravating circumstance.

Furthermore, the Court did consider this issue, and found that "the fact that Appellant's conviction for [the Thompson] murder was not final does not affect the admissibility of evidence of this

offense," for the purpose of proving the continuing threat aggravator. The Court then held:

Our decision is not altered by the fact that Appellant's conviction for the Thompson homicide has been reversed and remanded for a new trial. (Citation omitted). As the case was not reversed on the basis of insufficient evidence of guilt, the facts of the Thompson homicide remain relevant evidence which the jury in the instant case should consider in determining the appropriateness of the death sentence.

Romano, 847 P.2d at 389. The Court then found that the evidence was sufficient to support the continuing threat aggravator.

Romano, 847 P.2d at 394.

The Court of Criminal Appeals properly considered all issues presented before it in the direct appeal proceedings. Petitioner's arguments do not present any basis for certiorari review.

#### CONCLUSION

This Court should deny the Petition for Writ of Certiorari.

Respectfully submitted,

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vs.

THE STATE OF OKLAHOMA,

Respondent.

AFFIDAVIT OF MAILING

STATE OF OKLAHOMA     )  
                              )     ss.  
COUNTY OF OKLAHOMA    )

Sandra D. Howard, being first duly sworn, states:

1. That I am attorney of record in the above-styled case representing the State of Oklahoma and am a member of the Bar of this Court.

2. Pursuant to Rule 29.2 of the Rules of this Court, on July 23, 1993, at approximately 5:00 p.m. Central Standard Time, I caused to be placed 11 copies of the Respondent's Response to Petition for a Writ of Certiorari in a package properly addressed to the Clerk of this Court, with postage prepaid, and caused the package to be placed in the United States Mail in Oklahoma City, Oklahoma.

FURTHER AFFIANT SAYETH NOT.

Sandra D. Howard  
SANDRA D. HOWARD

Subscribed and sworn to before me this 23rd day of July, 1993.

Betty Jean Bennett  
Notary Public

My Commission Expires:

3-1-95

No. 92-9093

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CERTIFICATE OF SERVICE

I, Sandra D. Howard, a member of the Bar of this Court, hereby certifies that 1 copy of the foregoing was mailed by first-class, postage prepaid mail, to the counsel for Petitioner:

Ms. Lee Ann Jones Peters  
Assistant Public Defender of Oklahoma County  
320 Robert S. Kerr, Room 611  
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Sandra D. Howard  
SANDRA D. HOWARD  
ASSISTANT ATTORNEY GENERAL  
CHIEF, CRIMINAL DIVISION

Dated: July 23, 1993